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No. 01-1572

In The

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This lawsuit alleges false claims made by petitioner Cook County, Illinois to the federal government in order to receive federal grant money. Between 1989 and 1995, the federal government paid petitioner more than $5,000,000.00 on the representations that petitioner had enrolled at least 300 drug-addicted women in an experimental program, that it had randomly assigned half of them to a comprehensive treatment program at Cook County Hospital ("CCH"), that the women and their children would receive "cadillac" treatment there, and that CCH was following protocols regarding such issues as the protection of human research subjects and the use of methadone. The respondent alleges that these representations were false. Many of the claimed enrollees were "ghosts" – people who were not in fact enrolled in the program. Few of the women who did enroll and who were assigned to CCH for treatment actually received the treatment promised. The programs for the children were substandard. Petitioner was not following the protocols it had promised to follow. Petitioner subsequently persuaded the federal government to extend the program grant by representing that dozens of pregnant women would otherwise go without services – yet there were at most seven pregnant women in the program.

Respondent Dr. Janet Chandler, the project director and later the co-principal investigator, blew the whistle on petitioner's false claims. She sued under the False Claims Act (hereafter "FCA"), 31 U.S.C. §§3729-3733 (2000), to recover, on behalf of the United States, money paid in reliance on petitioner's false representations for work that was not performed.

Cook County moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(6), arguing (1) that the 1863 Congress that passed the FCA did not intend it to apply to municipal corporations; or (2) if it did, then Congress intended to

rescind that coverage *sub silentio* through an amendatory act in 1986 that increased FCA damages from double to treble. The district court accepted the latter argument, but the Court of Appeals reversed, and this Court has granted *certiorari* to resolve a split in the circuits on whether the FCA applies to municipal corporations.

1. The facts of this case.

The amended complaint (R. 14), whose allegations must be accepted as true on this appeal, alleges the following facts.

In March, 1989, the National Institute of Drug Abuse (NIDA) awarded a $5 million grant to CCH and its affiliate, The Hektoen Institute ("Hektoen"). The grant funded a five-year study of at least 300 drug-abusing pregnant women randomly assigned either to a comprehensive "one-stop" medical and social service program to be provided by CCH or to substance-abuse and medical services otherwise available within the community. Amended complaint, R. 14, ¶¶1-3. Petitioner conducted the research and provided the services for the grant, directly or indirectly received all of the grant funds, and participated in the false claims at issue from beginning to end.

By August, 1993, petitioner had fallen far short of its recruitment and retention commitments. NIDA placed it on probation, and gave it until December, 1993 to demonstrate significant improvement in enrollment or lose its funding. *Id.* ¶67. Although financial administration of the grant was transferred to Hektoen, Dr. Ellen Mason, an employee of CCH, became the principal investigator, and the research continued to be performed at CCH. *Id.* ¶¶69-72.

In December, 1993, petitioner reported that 205 research subjects were enrolled, a substantial increase from the 120 research subjects it had reported in May. In fact, however, at least 45 of these subjects were "ghosts"

(*i.e.*, persons not enrolled in the program). *Id.* ¶68. Petitioner failed to disclose the "ghosts" to NIDA or to adjust the enrollment figure. *Id.* ¶70. As a result of defendants' false claim to have made significant progress, NIDA lifted the probation and continued paying the grant money. Seven months later, defendants sought and received additional funding by making the false claim that 87 births were expected from patients who could no longer be part of the study if the grant was not extended. *Id.* ¶72. In fact, only seven research subjects were pregnant. *Id.*

As part of the grant, petitioner promised that it would follow a series of protocols relating to the use of human research subjects, guaranteeing that participants would give informed consent for both treatment and research, requiring thorough medical and drug histories and proper physical examinations, requiring the maintenance of accurate research and medical records, and governing the use of methadone. *Id.* ¶¶31, 58. Petitioner in fact knowingly failed to adhere to these protocols despite its assurances to the federal government that it would comply. *Id.* ¶¶33-39, 47, 49-64.

In January, 1995, Dr. Chandler met with the assistant to the director of CCH to voice her concerns regarding the false data and other problems. *Id.* ¶92. Three weeks later, she was fired. *Id.* ¶97.

2. The False Claims Act and its 1986 Amendments.

The FCA imposes liability on "[a]ny person who . . . knowingly presents or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a). The term "person" has appeared unchanged in the FCA since its original enactment. *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783, n.12 (2000). The FCA does not define "person."

Under the original FCA, violators were subject to double damages, as well as civil and criminal penalties.

The FCA has been amended several times. In 1943, Congress (a) created an absolute bar to jurisdiction over *qui tam* suits if the government had prior knowledge of the false claim; and (b) reduced the relator's share from 50 percent to 25 percent. Act of 1943, ch. 377, 57 Stat. 608. These amendments achieved their intended result of "largely eliminating the *qui tam* suit." James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* 47 (3d ed., 2002).

In 1986, spurred by a desire to modernize and revitalize the FCA, Congress again amended the Act. Those amendments created a new investigative tool for the Justice Department, the Civil Investigative Demand, §3733; enacted a new anti-retaliation provision designed to protect whistleblowers and increased the percentage of recovery whistleblowers can receive, §3730(d) and (h); increased damages from double to treble and increased the civil penalties imposed under the Act, §3729(a); and clarified that proof of fraud is not necessary, only proof that the defendant knew or had reason to know its claim was false, 3729(b). All these changes were designed to increase the scope and effectiveness of the FCA. Senate Report No. 99-345 (hereafter "S.Rep. 99-345"), at 2-3, reprinted in 1986 U.S. Code Cong. & Adm. News 5266.

3. Decisions of the courts below.

Petitioner moved to dismiss this lawsuit pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that municipal corporations are not subject to liability under the FCA. The district court initially rejected that argument. *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 35 F.Supp.2d 178 (N.D.Ill. 1999). On May 26, 2000, this Court decided *Stevens*, holding that States are not a "person" subject to liability under the FCA. Petitioner then sought reconsideration of its earlier motion,

and the district court then dismissed petitioner from the case. The district court reaffirmed its earlier holding that municipal governments were included in the term "person" under the FCA, but held that under *Stevens*, the amended treble damage provision is "essentially punitive in nature," and "the county is immune from the imposition of punitive damages, which are mandatory if liability is found under the FCA." *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 118 F.Supp.2d 902, 903 (N.D.Ill. 2000).

The court of appeals for the Seventh Circuit reversed. *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 277 F.3d 969 (7th Cir. 2000). It held that a local government is a "person" for purposes of the FCA and that they are subject to treble damages in *qui tam* lawsuits.

The court of appeals first concluded that Congress intended the term "person" to include local governmental units when it enacted the FCA in 1863. The court found that, by the time of the FCA's enactment in 1863, both "private and municipal corporations [unlike States] were presumptively included within the meaning of 'person,'" and therefore local governments (unlike States) were intended to be a "person" under the original FCA. 277 F.3d at 974. The court found nothing in the text or structure of the FCA to suggest "an exception for suits against municipalities." *Id.*

Next, the court of appeals found nothing in the 1986 Amendments to suggest that Congress intended to eliminate the FCA's preexisting coverage of local governments or to change the established meaning of the term "person." *Id.* To the contrary, the court noted that every change made in 1986 was intended to make the FCA more effective. The court identified three aspects of the 1986 amendments that "point[] to a finding of continued municipal liability." *Id.* First, the new Civil Investigative Demand (CID) provision, §3733, defines "person" to

include States and local subdivisions of States. *Id.* at 975. Thus, Congress intended municipalities to be targets of investigations, and given the presumption in 1863 that "person" includes municipalities, nothing in the CID provision "support[s] an inference that Congress intended them to be exempt" from suits. *Id.* at 975. Second, the legislative history shows that Congress intended to subject public employers to the new whistleblower-liability provision. Since under *Stevens*, States are exempt from liability under the FCA, Congress would have had no reason to protect public sector employees if municipalities were not potentially liable as a general matter under the FCA. *Id.* Third, other changes made in 1986 to strengthen the FCA militated against implying an intent by Congress to exclude, *sub silentio*, municipalities from the FCA's preexisting coverage. *Id.* at 976.

The court of appeals then considered whether Congress "made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities" from the type of "essentially punitive" treble damages provided by the 1986 Amendments to the FCA. *Id.* at 977. The court of appeals analyzed this issue under *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), which held that Congress, in passing the Civil Rights Act of 1871 (42 U.S.C. §1983), had not intended punitive damages to be recoverable against municipal governments. The court of appeals found that the considerations which led this Court in *Newport* to find common-law punitive damages unavailable under §1983 dictated the opposite conclusion as to the FCA's treble damages.

The court of appeals first concluded that applying the treble-damage provision to municipal corporations was compatible with the purpose of the FCA. The court found "important differences between [damages] available under §1983 and those imposed by the FCA." *Id.* at 978. Unlike §1983, the FCA does not borrow a common-law conception of damages, but includes a carefully-crafted damage scheme that "provides a clear and consistent remedy for

all violations of the FCA." *Id.* The court of appeals observed that the FCA's remedy is not divided into compensatory and punitive damages, but instead calls for a trebling of actual loss which, while "punitive in nature . . . is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.*

Second, the court of appeals concluded that the FCA's carefully-crafted remedy mitigates the risks discussed in *Newport*. *Id.* at 978. Specifically, that remedy avoids the "broad discretion accorded juries in assessing the amount of punitive damages" under §1983, and has a specific upper limit that is directly related to the federal government's loss. *Id.* at 978. In contrast to §1983, where all of the damages come from the municipality's tax base, under the FCA "a portion of the recovery will come from the monies taken by the municipality through its false claims and the local taxpayers have already received, without justification, some of the benefit." *Id.*

The court of appeals concluded that "hold[ing] counties immune from the FCA's damages . . . would frustrate the clear intention of Congress," *id.* at 978, and it rejected the contention that in effecting the increase [in damages], Congress intended to exempt municipalities from the FCA *sub silentio*." *Id.* at 979.

SUMMARY OF THE ARGUMENT

1. Congress intended in 1863 to include municipal corporations within the term "person" in the FCA.

a. The term "person" has remained unchanged in the FCA since its passage, and therefore has the same meaning today it had in 1863. As this Court held in *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978), by 1869, when this Court decided *Cowles v. Mercer County*, 74 U.S. 118 (1869), the term "person" presumptively included municipal corporations. It did so in 1863 as well. Petitioner's assertion that the common-law understanding

of "person" drastically changed within a mere six years is highly implausible, and no evidence supports it. Instead, abundant historical evidence, including case law and contemporary treatises, shows that well before 1863, the term "person" presumptively included municipal corporations.

b. As petitioner concedes, Congress in 1863 intended the term "person" in the FCA to include private corporations. Congress intended that term to include municipal corporations as well. It is implausible that a term that included one kind of corporation by implication excluded another kind, and no evidence supports such an implied exclusion. Instead, federal and state case law and contemporary treatises show that by 1863, American law presumptively equated municipal corporations with private corporations in their susceptibility to suit.

c. Congress had no intention in 1863 of limiting the meaning of "person" from its settled presumptive meaning. *Stevens* expressly rejected petitioner's principal argument to that effect, which revolves around references in the FCA to military status and criminal penalties. Similarly, the fact that the FCA was motivated largely by frauds perpetrated by private Civil War contractors does not restrict the meaning of "person" in the FCA. This Court has never limited the coverage of the FCA or of other broadly written remedial statutes to the particular class of wrongdoers whose misdeeds prompted the passage of those statutes. To the contrary, this Court and lower courts for a century have interpreted the FCA broadly to reach all manner of parties involved in any manner of fraud against the federal government.

2. Congress did not intend, in the 1986 Amendments, to narrow the FCA's reach in any way, much less to put an end, *sub silentio*, to the FCA's prior applicability to municipal corporations.

a. Displeased by the near-disuse into which the FCA had fallen, Congress enacted the 1986 Amendments to revitalize the Act, expand its remedies, and give the federal government new enforcement tools. Given that purpose, it is implausible in the extreme that the 1986 Amendments intended, *sub silentio*, the momentous *curtailment* in the FCA's coverage that petitioners ask this Court to imply. Nothing in the Amendments' text implies such a curtailment. The Amendments left the term "person" unchanged, and a new provision subjecting municipal corporations to CID demands implies that Congress viewed such corporations as already subject to the FCA. Likewise, the Amendments' legislative history is inconsistent with an intent to end the FCA's coverage of municipal corporations.

b. Petitioner analogizes treble damages to common-law punitive damages, and asserts that because Congress in 1986 failed to specify that treble damages applied to municipal corporations, Congress must be presumed to have effectuated an implied repeal in 1986 of the FCA's previous coverage of such corporations. The argument has no merit.

(1) The presumption of Congressional intent invoked in *Newport* is one tool of ascertaining Congressional intent among many – not an absolute rule that trumps all other evidence of Congressional intent. *Newport* did not hold that Congress' failure to specify the applicability to municipal governments of punitive or treble damages automatically requires a finding that such governments were not subject to them.

(2) The presumption invoked by petitioners puts Congress on notice that in passing provisions allowing punitive damages, it should specify that municipalities are covered, or it will be presumed not to intend such coverage. But invoking that presumption to determine Congress' intent makes sense, and is a fair measure of congressional intent, only if Congress understands that

the remedy it is enacting is punitive in nature. When Congress increased the FCA's damages to treble damages in 1986, it believed that treble damages were essentially remedial, not punitive, in nature. In this belief, it was supported by extensive case law. While this Court observed many years later in *Stevens* that treble damages were "essentially punitive in nature," this conclusion casts no light on Congress' intent in 1986. Since Congress believed in 1986 that its new remedy was nonpunitive, it is inappropriate to infer anything about Congress' intent from its failure to specify that the treble-damages provision applied to municipalities.

(3) This Court has never invoked, and should not invoke, the common-law punitive damages presumption to justify an implied repeal of an entire statute's coverage of municipalities. Using the presumption for such a purpose would transform it from a sensible tool for ascertaining Congressional intent into a means for overruling clear Congressional intent.

c. Aside from its "presumption" argument, petitioner offers no other convincing reason to support its implausible reading of Congress' intent in 1986. In particular, the "policy" arguments offered by petitioner against applying treble damages to municipal corporations offer no basis for overruling Congress' choice. While treble damages have now been declared by this Court to be "essentially punitive" in nature, there remain important differences between treble damages and common-law punitive damages. As the court of appeals rightly held, those differences mitigate the concerns about imposing treble damages on municipalities. Moreover, petitioner's specific "policy" arguments amount to quarreling with the remedial scheme chosen by Congress to assure that federal money will not be stolen by local governments. As the presence of the United States *amicus curiae* in support of respondent attests, the FCA's applicability to municipal corporations, including its treble damage provision, is of

great importance both to recovering fraudulently spent money and to deterring future fraud.

ARGUMENT

I. CONGRESS INTENDED "PERSON" IN THE ORIGINAL FCA TO INCLUDE MUNICIPAL CORPORATIONS.

A. When Congress Enacted The FCA, The Term "Person" Presumptively Included Municipal Corporations.

The term "person" is nowhere defined in the FCA, but it has remained unchanged throughout the life of the FCA. The meaning of "person" in the FCA therefore depends on what Congress in 1863 intended it mean. *See Stevens*, 529 U.S. at 783, n.12.[1] That inquiry must begin with an analysis of what the term generally meant at that time. As this Court has held, we must assume that Congress was "familiar with common-law principles . . . and that they likely intended these common-law principles to obtain,

[1] *Stevens* held that the 1863 FCA was not intended to apply to States, since at that time a State was not presumptively a "person." Petitioner does not contend that this holding controls the very different issue of whether a *municipal corporation* as of 1863 was included in the term "person." Moreover, the constitutional considerations that influenced the statutory construction of the term "person" in *Stevens* are absent here. In *Stevens*, holding that States were "persons" under the FCA would have raised doubts of the FCA's constitutionality under the Eleventh Amendment. 529 U.S. at 787. Petitioner does not argue that the Eleventh Amendment would prevent municipal corporations from being sued under the FCA. *Accord., e.g., Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (Eleventh Amendment immunity does not "extend to counties and similar municipal corporations").

absent specific provisions to the contrary." *Newport*, 453 U.S. at 258.

Two settled propositions, both of which petitioner concedes, provide the starting point for analyzing what "person" presumptively meant in 1863:

- By 1869, when this Court decided *Cowles*, "person" presumptively included corporations, both private and municipal. *Monell*, 436 U.S. at 688. The presumption was codified two years later by Congress in the Dictionary Act of 1871, 1 U.S.C. §1 (1871).
- Congress meant "person" in the 1863 FCA to include *private* corporations, which have always been held subject to the FCA. *Stevens*, 529 U.S. at 782.

Taken together, these two facts, even without more, strongly point to the conclusion that in 1863, "person" presumptively included municipal corporations. Otherwise, (1) something happened in just six short years to give "person" a presumptive meaning in 1869 that it lacked in 1863; and (2) "person" in 1863 included one form of corporation (private) but excluded another form (municipal). Both notions are implausible – to say the least – and the historical evidence shows that both are wrong. By 1863, courts throughout America were routinely assuming that a municipal corporation is a "person." And by 1863, courts were routinely equating public and private corporations for purposes of being sued.

1. By 1863, "person" presumptively included municipal corporations.

Nothing happened between the passage of the FCA in 1863 and this Court's 1869 decision in *Cowles* to extend the common-law understanding of "person" to a new category – municipal corporations. To the contrary, by 1863, a municipal corporation's status as a legal "person"

was a non-controversial proposition, acknowledged by courts and commentators alike.

In 1848, in *Ross v. City of Madison*, 1 Ind. 281, 284 (1848), the court wrote:

> It may also be considered settled that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government.

The following year, in *Mayor and Alderman of Memphis v. Lasser*, 28 Tenn. 757, 760 (1849), the Tennessee Supreme Court wrote:

> It is well settled at this day both in England and America that such a [municipal] corporation is liable to be sued in actions of tort in like manner as natural persons. . . .

The following year, in *Comm'rs of Kensington v. County of Philadelphia*, 13 Pa. 76, 77 (1850), the Pennsylvania Supreme Court wrote:

> [A] municipal corporation is a person as distinctly within the letter of the act of 31st May 1841 [which allowed a "person or persons" whose property was destroyed by a mob to bring suit] . . . and why should it not be within its protection?

In 1854, a legal dictionary listed "corporation" as one of the definitions of "person." 2 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union* 332 (1854).[2]

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[2] Bouvier's definition of "person" also indicates that when the plural is used in legislation – "persons" – it was more likely to mean only natural persons. Vol. II, at 333. The FCA uses the word in the singular.

In the decade before the Civil War, courts continued to act on this understanding. Four years before the FCA was passed, in *Cotes & Patchin v. City of Davenport*, 9 Iowa 227, 233 (1859), the Iowa Supreme Court commented:

> The doctrine that a municipal corporation is liable for malfeasance, or the negligence of its agents in the construction of public improvements upon the same principle and under the same circumstances as the individual citizen . . . now has been recognized in this state and may be regarded as well-established.

The following year, in *Argenti v. City of San Francisco*, 16 Cal. 255, 266 (1860), the California Supreme Court wrote:

> [I]n matters of contract, a public corporation is regarded merely as a legal individual and treated in all respects as a private person. . . . The course of modern decisions seems to place corporations, with regard to their mode of appointing agents, and making contracts in general, upon the same footing with natural persons.

In 1861, the Supreme Court of Wisconsin wrote:

> We have no doubt that the word 'person' extends to municipal corporations. . . . We can conceive of no possible reasons why the statute should not extend to corporations, public or private, for the remedy is quite as essential and necessary against them as against a natural person.

Rains v. City of Oshkosh, 14 Wis. 372, 374 (1861).

In short, the evidence confirms what common sense suggests. The presumption that "person" included municipal corporations, which petitioner admits prevailed in 1869, was as widespread and non-controversial six years earlier, when Congress enacted the FCA.

2. By 1863, municipal and private corporations were widely equated for purposes of being sued.

Since Congress in 1863 unquestionably intended "person" in the FCA to cover private corporations, petitioner necessarily asserts that Congress intended to distinguish, in the word "person," between private and municipal corporations in terms of their susceptibility to suit under the FCA. Again, the historical evidence shows the contrary.

Although the term "person" can be used in statutes for many different purposes, one of the most important purposes – and the purpose involved in the FCA's use of the term – is that of determining whether a defendant is subject to being sued. By 1863, it was widely accepted that private and municipal corporations in this respect rested on the same footing. Like private corporations, public or municipal corporations "were treated as natural persons for virtually all purposes of constitutional and statutory analysis . . . [,] were routinely sued in both federal and state courts[, and] were regularly held to answer in damages . . . for common law actions for breach of contract." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 639, n.19 (1980) (citing pre-1863 cases). Municipal corporations received the same treatment as private corporations for purposes of being subject to suit in federal court.

In fact, in that era, fewer distinctions were drawn between private and public corporations than might be drawn today. Today it is less common to refer to local governments simply as "corporations." Not so in pre-FCA America. In *Board of Com'rs of Knox Co. v. Aspinwall*, 65 U.S. (24 How.) 376, 383-85 (1859), this Court referred to Knox County as "the corporation," without qualifiers like "public" or "municipal," and held that subjecting "the corporation" to a petition for mandamus in federal court was "agreeable to the principles of the common law." *Id.* at 385. *See also Clark v. Mayor of Washington*, 25 U.S. (12 Wheat.) 40 (1827) (this Court referred to the City of

Washington as "the corporation" and held it responsible for the acts and contracts of its agents); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815); *Trustees of Dartmouth College v. Woodward*, 65 U.S. (4 Wheat) 518, 594, n.12 (1818). As a district court commented in 1862:

> Though the metaphysical entity called a corporation, may not be physically a citizen, yet the law is well settled that it may sue and be sued in the courts of the United States. . . . That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another state should have his remedy in this court.

McCoy v. Washington County, 15 F.Cas. 1341, 1343 (W.D.Pa. 1862).

The federal courts were not alone. States treated municipal corporations essentially like private corporations in terms of their susceptibility to suit, as well as other rights and responsibilities. For example, in *Rains v. City of Oshkosh*, quoted *supra* at 14, the Wisconsin Supreme Court, in equating municipal corporations to a "person," expressly equated public to private corporations. In 1858, in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 471-72 (1858), the California Supreme Court observed that

> [t]he reports in other States are full of adjudged cases where actions upon implied contracts have been sustained against municipal corporations. They have been argued by able and distinguished counsel, and decided by eminent Judges, and the distinction has never been made between the liability of a private corporation and a municipal corporation, under circumstances analogous to those presented in the case at bar.

That same year, in *Henry Atkins & Co. v. Town of Randolph*, 31 Vt. 226, 237 (1858), the Vermont Supreme Court wrote:

> As far as a municipal corporation is endowed by law with the power of contracting . . . and subject

> to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, [it is] ascertained and enforced by suit in the ordinary judicial forums, upon the same principles, and by the same means as in the case of a private corporation. . . . As to third parties who seek to enforce pecuniary liabilities against towns arising upon contract, such towns are merely private corporations or individuals.

See also Newport, 453 U.S. 247, 259, n.19 (1981) (citing to pre-1863 case of *Bailey v. Mayor of New York*, 3 Hill 531, 539 (N.Y.Sup.Ct. 1842), *aff'd* 2 Denio 433 (1845)) (municipal corporations "stood on the same footing as a private corporation" and, like private corporations, were "to be treated as a natural person subject to suit for a wide range of tortious activity").[3]

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[3] The New York *amici* argue that in 1863, only some municipalities were true corporations, while others were "quasi-corporations." (In this distinction, where it existed, municipal corporations, which were created at the behest of their residents, were "corporations," while quasi-corporations included public entities which were not created at the behest of their residents.) As a result, *amici* argue, there could not have been a presumption that municipalities were "corporations." Brief of *Amici* City of New York *et al.*, pp. 7 ff.

It is unclear where this argument leads, since no one asserts that Cook County was anything other than a full-blooded "corporation" as of 1863. But in any event, the argument, whatever its historical accuracy, has no merit in the context of a statute like the FCA, in which claims against corporate defendants grow out of their contractual relationship with the federal government as grantor of funds.

Where it existed, the 19th-century distinction between corporations and quasi-corporations was meaningful only in relation to certain kinds of tort liability which are not relevant to the FCA. Because they "did not compose a corporate body; but were merely individuals" with no specified authority or powers, some entities, like school boards, "may be considered . . . quasi-corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage," *Inhabitants of Fourth School Dist. in Lombard v. Wood*, 13 Mass. 193, 198 (1816),

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Contemporary treatises also explain that public and private corporations alike are subject to suit. An 1852 corporate law treatise reported:

> It is indeed now, and has ever been, perfectly well established, that corporations, whether

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and therefore were not subject to suit when they failed to perform duties not imposed upon them. *See, e.g., Eastman v. Meredith*, 36 N.H. 284 (1844). But even in Massachusetts, and the other States that followed this line of reasoning, a municipal body would have been liable for the wrongful willful acts of its agents and upon its contracts. *Thayer v. Boston*, 36 Mass. 511, 516 (1837). Later cases had little trouble, however, finding quasi-corporations liable, even in tort, especially when they had specifically undertaken or been charged with performing a specified function. *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468 (1864) (holding a county liable for the death of a horse as a result of an improperly maintained road).

The limited nature of this distinction between municipal corporations and quasi-corporations, where the distinction existed, was clearly established. In 1872, Dillon's treatise, although reporting on the variations among the states regarding liability in negligence, found no ambiguity with respect to suits involving activities local units of government had affirmatively undertaken:

> [the rule limiting the liability of quasi-corporations, including townships and counties, from liability in negligence] is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate consent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred upon it, at its request.

John F. Dillon, *A Treatise on the Law of Municipal Corporations*, §763 at 874 (2d ed. 1872). Local governments that accepted grants from and entered into contracts with the federal government were clearly under the sort of particular obligation that would have rendered them susceptible to suit under the FCA for misspending that money. Indeed, despite the reluctance of some states to hold certain types of municipalities liable in tort – a reluctance that extended, as Dillon's treatise demonstrates, at least until 1872 – Congress in 1871 imposed (as *Monell* held) a form of tort liability on all local governments under §1983, using the same term, "person," that is at issue here.

> public or private, may commence and prosecute all actions, upon all promises and obligations, implied as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them. [Citing, in a footnote, *McKim v. Odon*, 3 Bland (Md) Ch.R.417, and *Gordon's Exrs v. Mayor, &c. of Baltimore*, 5 Gill (Md) R.231.]
>
> * * *
>
> Secondly, of the liability to be sued. Having thus considered the subject of the corporate right to sue, we are next to treat of the corporate liability to be sued. The ancient doctrine was, that the action of assumpsit could not be supported against a corporation, unless in the case of promissory notes, and other contracts sanctioned by particular legislative provisions. . . . But it having since become well settled, by the more recent decisions of the Courts of the United States, that corporations may act by parol [internal citations omitted], it has resulted, as a matter of course, that assumpsit will lie against a corporation, and such is now the established doctrine in this country.

Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate*, at 401, 411 (7th ed. 1852).[4] Similarly, John Bouvier's 1854 legal dictionary (cited above at p. 13) under "corporation," listed "[p]ublic corporations, which are also called political, and sometimes municipal corporations. . . ." Vol. I, p. 318.

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[4] In fact, counties were routinely sued in state courts over financial obligations in the mid-1800s. *See, e.g., Crawford County v. Wilson*, 7 Ark. 214 (1846); *Gilman v. County of Contra Costa*, 8 Cal. 52 (1857); *Justices of the Inf. Court of Talbot County v. House*, 20 Ga. 328 (1856); *McDaniel v. Yuba County*, 14 Cal. 444 (1859); *Autauta County v. Davis*, 32 Ala. 703 (1858); *Boone Landfill, Inc. v. Boone County*, 51 Ill. 538 (1972) (acknowledging the ability of counties to sue and be sued in Illinois since 1827).

In short, the historical evidence shows that the same presumption recognized by *Monell* to prevail in 1869 – that "person" included municipal corporations – prevailed when Congress passed the FCA six years earlier. And that evidence shows that as of 1863, no basis existed for presuming that a term – "person" – that included private corporations would exclude municipal corporations.

As that evidence further shows, there is no merit to petitioner's claim that this Court's 1869 decision in *Cowles* broke new legal ground. Pet. Br., 13-16. In 1844, this Court had held that a private corporation would be treated as a "person" and as a citizen of its state of incorporation, and was hence subject to suit under diversity jurisdiction. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). In 1853, in *Aspinwall*, this Court held that a county – which, as discussed above, it called "the corporation" – was subject to suit. 65 U.S. (24 How.), at 383-85. In *Cowles*, this Court "automatically and without discussion extended [*Letson*] to municipal corporations," and held that municipal corporations, like private corporations, were presumptively included in the term "person." *Monell*, 436 U.S. at 688. *Cowles* did not purport to change the law, but to make a non-controversial application of well-established law. Even the holding in *Cowles* – that a municipal corporation was a "citizen" of the state in which it was situated and therefore was subject to suit in federal court based on diversity jurisdiction – was non-controversial.[5] As this Court explained in *Cowles*:

[5] Petitioner emphasizes *Cowles*' initial observation that

> [t]he record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois.

Pet. Br., 16, quoting 74 U.S. (7 Wall.), at 121. While this Court indeed had not been called upon to address this question before, it found the

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> The question [of] whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States . . . presents but little difficulty.
>
> [Since *Letson*,] a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen with the meaning of the Constitution giving jurisdiction founded upon citizenship. . . .
>
> It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county.

74 U.S. (7 Wall.) at 121-22.

Moreover, contrary to petitioner's and some *amici*'s arguments, *Monell* does not "date the presumption that municipal corporations were persons . . . from the 1869 decision in *Cowles*." Brief *Amici Curiae* of City of New York *et al.*, at 12. Instead, *Monell* recognizes the obvious: "Under [the *Letson*/*Cowles*] doctrine, municipal corporations were routinely sued in the federal courts." As an example, *Monell* cited an 1864 opinion in *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864), which itself cited other pre-1864 cases. 436 U.S. at 673.

Similarly, nothing supports petitioner's implicit contention that the passage of the Dictionary Act in 1871 marked a sudden new understanding of the term "person." Pet. Br., 14. To the contrary, this Court in *Stevens* cited the 1871 Dictionary Act to support its holding that corporations "are presumptively covered by the term 'person'" in

answer easy. Given that the board of supervisors was properly characterized as a corporation, the answer followed immediately from *Letson*, a case decided in 1844. *Cowles* found no difficulty in stating that Mercer County was a "corporation." Given *Aspinwall*, decided many years before, and abundant other authority discussed in this brief, that question was non-controversial.

the 1863 FCA. 529 U.S. at 782, citing 1 U.S.C. §1. Both *Cowles* and the Dictionary Act simply articulated a preexisting and well-established common-law understanding of what "person" meant.

B. The 1863 FCA's Language And Legislative History Show No Intent To Negate The Common-Law Presumption That A Municipal Corporation Was A "Person."

Since the same presumption about municipal corporations as "persons" existed in 1863 as in 1869, the FCA's use of that term includes municipal corporations unless clearly excluded by the language or legislative history. Neither the language nor the legislative history effectuates such an exclusion.

1. Nothing in the 1863 Act's text excludes municipal corporations.

Nothing in the 1863 FCA defined "person" at all. There is nothing in the text of the Act excluding municipal corporations.

Petitioner nonetheless purports to find textual support for such an exclusion in "two features" of the Act: (a) the FCA's use of military status to qualify the term "person"; and (b) the inclusion of criminal penalties. The argument is that corporations (municipal or private) cannot be in the military, and cannot be imprisoned. Pet. Br., 12-13.

Petitioner's heavy emphasis on this argument is puzzling, for it was made and rejected in *Stevens*, as petitioner belatedly and indirectly concedes. Pet. Br., 19. As *Stevens* recognized, accepting petitioner's argument would require the conclusion that the FCA does not apply to any kind of corporation, public or private. This Court declined to reach such a conclusion, which would destroy the FCA. The Court refused to "cast doubt upon the courts' assumption that §3729(a) extends to corporations ...

because the presumption with regard to corporations is ... [that, unlike States] they are presumptively covered by the term 'person,' see 1 U.S.C. §1." 529 U.S. at 782.

In short, because the term "person" as understood in 1863 covers corporations, those "features" of the Act that apply only to natural persons do nothing to alter that plain meaning. *See United States v. Union Supply Co.*, 215 U.S. 50, 54 (1909) (even where a criminal provision provided for mandatory imprisonment, as well as a fine, it was applicable to corporations). If those "natural person" features do not remove private corporations from the coverage of the FCA, no principled argument can be made that they remove public corporations. It is as impossible to enroll a public corporation as a private one in the military, or to imprison it.

2. The legislative history supports inclusion of municipal corporations in the FCA.

Petitioner claims that Congress' focus on Civil War contractors when it passed the FCA precludes inclusion of municipal corporations. And petitioner claims that amendments to the original bill between its introduction and ultimate passage, narrowed its scope from "any person" to "any person" modified by military status and shows Congress' intent to exclude municipal corporations. Pet. Br., 17-19. Both arguments are contradicted by the legislative and historical record.

a. Congress intended the FCA to have broad scope.

The impetus for the 1863 Act was "stopping the massive frauds perpetrated by large contractors during the Civil War," *United States v. Bornstein*, 423 U.S. 303, 309 (1976), who were "plundering ... the public treasury in the purchasing of necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). These "necessities of

war" were not limited to munitions produced by individual contractors. They included everything "required for human use and consumption in order not only to sustain life but to destroy it," such as contractors for food, clothing, arms and munitions, hospitals and hospital supplies, and all modes of transportation from mules to railroads and steamships. Robert Tomes, "Fortunes of War," *Harpers' Monthly*, 227 (July, 1864). These contractors – and fraudsters – included the railroads, coal mines, and other corporate entities. *Id.* at 227-28. This context supports the presumption, accepted by this Court in *Stevens*, that Congress did not intend to limit "person" to natural persons.

Petitioner, nevertheless, reads this historical context to mean that the narrow purpose of the 1863 statute was to ferret out fraud by munitions contractors during the Civil War and that because there is no record of local governments selling munitions to the federal government in 1863, Congress could not have intended to cover units of local government. But there is no evidence that Congress intended to limit the scope of the FCA to the particular abusers whose misdeeds prompted the Act's passage. Such a limitation of the FCA's reach would contradict years of jurisprudence interpreting it broadly to reach all manner of parties involved in any manner of fraud against the federal government. *See, e.g., Rainwater v. United States*, 365 U.S. 590, 592 (1958) ("the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims"); *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("[i]n the various contexts in which questions of proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading"); *id.*, at 233 (construing the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money"). The original FCA was written broadly; its scope was unlimited in terms of time period, types of fraud, or part of the government to which false claims are presented.

Moreover, false claims by municipal corporations cause the federal government the same harm as do fraudulent claims by private persons. As this Court reasoned in *Monell*:

> since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by §1 [42 U.S.C. §1983], and, further, since Congress intended §1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of §1.

436 U.S. at 685.

More generally, petitioner's argument, which raises the particular historical impetus for the Act above the broad language that Congress chose to employ, is an unacceptable method of statutory interpretation. This Court has never limited the reach of broadly written remedial statutes to the particular classes of wrongdoers who historically provoked the statutes' passage. A prime and recent example is RICO, 18 U.S.C. §1964 (2000), which was passed because of Congress' "perceived need to combat organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). This Court declined to limit RICO to the context of organized crime, because Congress "chose to enact a more general statute." *Id. See also National Organization for Women, Inc. v. Scheidler*, 510 U.S. 1215 (1994) (holding that RICO does not require an economic motive and allowing case to proceed against abortion protesters who tried to shut down abortion clinics).

b. The amendments to the FCA bill prior to its passage provide no support for petitioner's restrictive reading.

As originally introduced, the FCA would have provided that "any person" who presented a false claim "shall be deemed guilty of a high crime and misdemeanor, and

shall be deemed and treated as part of the land and naval forces in service of the United States," and shall be "held for trial by a court martial." S.467, 37th Cong., 3rd Sess. (Jan. 1863). As ultimately passed, however, the FCA applied to "[a]ny person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war" *and* "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service or any claim against the United States or any department thereof. . . . " Cong. Globe, 37th Cong., 3rd Sess. (1863) (hereinafter "*Globe*"), at 696, 698. The statute provided that persons in the military would be subject to court martial, *id.*, at 696, and a person not in the military shall "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages which the United States may have sustained . . . together with costs of suit" and shall be punished by imprisonment or by fine. *Id.* at 698.

Petitioner argues that the change from "any person" to "any person" modified by military status "narrowed substantially" the FCA and supports the argument that local governments were not included in the original FCA. Pet. Br., 17. Petitioner misreads the Act "as originally introduced," and, as a consequence, its argument is backwards.

The original sponsors believed that "contractors for furnishing supplies to the Army and Navy are just as indispensable as soldiers," and therefore should be subject to the military courts and military justice. *See Globe*, at 955. Moreover, Congress wanted "speedy and exemplary justice," *Globe*, at 954-56, and it was the apparent consensus that this was best provided in the military courts. *Id.* Congress was split, however, over whether court martial was appropriate or available for all fraudsters. *See, e.g., Globe*, at 957 (Sen. Davis) ("The distinctive features of the bill fix its paternity on the Secretary of War. He is prone to bring every person and every act within military law and military courts. But if the honorable Senator will change

his bill so as to make the offenses declared by it civil offenses, to be tried according to the course of the common law, I will support it with much satisfaction").

The final version of the FCA did not in fact subject all fraudsters to court martial. Thus, rather than limiting the scope of the term "person," that final version made clear that it was to be given broad scope. Those in the military, who are indeed limited to natural persons, would be subject to court martial. Everyone else, however, was liable for a range of civil and criminal penalties designed both to deter and to make the government whole. S.467, 37th Cong. 3d Sess., §§1-4.

Thus, nothing about the change cited by petitioner supports its argument. If anything, the change shows the opposite – the application of penalties that, unlike court martial, could be applied to corporations, both public and private.

In sum, nothing in the text or legislative history of the 1863 FCA justifies departing from the prevailing common-law understanding of what "person" presumptively meant. That understanding included corporations, municipal or private. Congress intended in 1863 that its broad remedial statute cover both kinds, not just private ones.

II. CONGRESS HAD NO INTENT IN 1986 TO REPEAL THE FCA'S APPLICATION TO MUNICIPAL CORPORATIONS.

Petitioner argues that even if the FCA originally reached municipal corporations, Congress *sub silentio* intended to eliminate that coverage when it amended the FCA in 1986 to change the damages provision from double damages to treble damages.[6]

[6] With respect to the 1986 Amendments, the issue this case presents is the polar opposite of the issue in *Stevens*. *Stevens*, after

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This argument has no merit. Petitioner asks this Court to reach an overwhelmingly unlikely conclusion about Congress' intent, given the context of the 1986 Amendments, the legislative history, and the text of the amendments. The presumption invoked by petitioner against applying punitive damages to municipalities in the absence of specific statutory language cannot justify a finding that in 1986 Congress repealed the FCA's preexisting coverage of municipal corporations. Nor do petitioner's other arguments justify its misreading of Congress' intent.

A. The purpose, legislative history, and text of the 1986 Amendments make it overwhelmingly unlikely that Congress intended to eliminate the FCA's preexisting coverage of municipal corporations.

The implied repeal argued by petitioner would have been a momentous change in the FCA's coverage. Petitioner asks the Court to believe Congress intended to make that momentous change (1) without changing the key word "person" that defines who is subject to the FCA; (2) through amendments which were intended to strengthen the FCA and expand its coverage; and (3) without a word in the legislative history indicating an intent to make the change petitioner asserts, and with ample legislative history indicating a contrary intent.

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holding that the term "person" in the original 1863 Act was not intended to apply to States, then analyzed whether the 1986 Amendments had effectuated, *sub silentio*, "a broadening of the term 'person' to include States." 529 U.S. at 783. The Court concluded that the Amendments had not done so. Here the situation is reversed. As shown in Section I, the 1863 FCA *did* intend to include municipal corporations in the term "person," and the issue is whether the 1986 Amendments, *sub silentio*, intended to *eliminate* that preexisting coverage. As will be discussed in the text, the answer is no.

This Court will rarely meet with a more factually-improbable assertion about Congress' intent in passing a statute. The purpose, text, and legislative history of the 1986 Amendments render petitioner's reading of Congress' intent unacceptable.

The overall purpose. The 1986 Congress amended the FCA with a clear and single purpose in mind – "to make the statute a more useful tool against fraud in modern times ... provid[ing] the Government's law enforcers with more effective tools [and] encourag[ing] any individual knowing of Government fraud to bring that information forward." S.Rep. 99-345 at 2. Toward that end, everything about the 1986 Amendments aggressively expanded, not cut back, the reach of the FCA:

- To encourage "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity" and without whom detection of fraud is "very difficult" (S.Rep. 99-345 at 4), Congress increased the percentage of the recovery to be awarded whistleblowers and created a whistleblower protection provision for relators and witnesses who engage in "lawful acts done ... in furtherance of an action under" the FCA. §§3730(b) and (h).
- Because "many courts had construed the Act to require actual proof of fraud and intent to submit false claims," Congress lowered the liability or standard of proof bar to require proof only that defendant "knows or has reason to know" that the claim is false. S.Rep. 99-345 at 7; §3729(b).
- Congress "increase[d] the recoverable damages [and] raised civil forfeiture" under the FCA to update the penalty enacted in 1863 "to reflect the passage of time and the effects of inflation," and to make the Federal Government whole for its losses. H.R.Rep. No. 99-660, at 17, 20 (1986); §3729(a).

- Concluding that it needed to enhance the government's "investigative tools," S.Rep. at 7, Congress granted new Civil Investigative Demand (CID) authority to the Department of Justice to aid in its investigations of FCA cases. §3733(a).

Given the aggressively expansive purpose of the 1986 Amendments, it is all but unthinkable that Congress intended, in the same statute, to cripple the government's ability to fight fraud by eliminating a huge category of recipients of federal funds – municipal corporations – who had previously been subject to the FCA. Had Congress had such an intent in this expansive statute, one would expect some indication of it, either in the text or the legislative history. Instead, the indications all run the other way.

The text. Not a word in the text of the 1986 Amendments suggests an intent to eliminate or cut back any aspect of the coverage of the FCA. The Act extends that coverage through its use of the word "person," and Congress pointedly left that word unchanged, as this Court noted in *Stevens*. 529 U.S. at 783, n.12. Moreover, when Congress added the new Civil Investigative Demand provision, it made municipal corporations subject to that provision. §3733(l)(4). As the court of appeals noted, that fact "points to a finding of continued municipal liability." 277 F.3d at 294.

The legislative history. Not a scrap of legislative history even hints that Congress intended to cut back the scope of the FCA in any way, much less to eliminate a huge category of previously-covered defendants. All the relevant legislative history points the other way.

First, in describing the explosion in frauds perpetrated against the United States, Congress complained that fraud "permeates generally all government programs," explicitly mentioning "welfare and food stamp programs" and "disaster relief programs." *See* S.Rep. 99-345 at 2. Local governments play a major role in the administration of both of these types of programs. *See, e.g.*,

42 U.S.C. §5141 *et seq.* (disaster relief); 42 U.S.C. §602(a)(1) (1982 Supp.); 7 U.S.C. §2012(n)(1) (1982 & 1985 Supp.) (welfare and food stamps). In light of this legislative history, petitioner's claim that "the focus in 1986 was on the defense industry and the fraudulent conduct of private contractors," Pet. Br., 31, is untenable. Congress was focusing on all programs, including those that provide money to local governments.

Second, the Senate Report asserts that historically "[t]he term 'person' [in the FCA] is used in its broad sense to include . . . states and political subdivisions thereof." S.Rep. 99-345 at 8. In *Stevens*, this Court would later determine that Congress had misread the 1863 Congress' intent as to States. But that mistake does not lessen the probative value of this statement about the 1986 Congress' intent. If municipal corporations were subject to the original FCA – and as Section I of this brief has shown, they were – this statement in the Senate Report is powerful evidence that eliminating that coverage was the last thing in the world Congress intended.

Third, the Senate Report specifies that the Act's new whistleblower-protection provision, §3730(h), was to apply to public-sector employees. S.Rep. 99-345 at 34-35. This statement shows a Congressional assumption that municipalities were already subject to the Act. For the FCA's anti-retaliation provision to protect municipal employees, they must have first made disclosures "in furtherance" of an FCA action (§3730(h)). The natural inference is that the FCA action they are furthering is an action against *their employer*. As the court of appeals noted, the employer is only likely to be angered by their disclosures if they threaten the *employer* itself with FCA liability:

> [u]nless municipalities are subject to suit under the FCA, Congress would have no reason to be concerned that municipalities might retaliate against their employees for bringing FCA claims. Given that states are excluded from the definition of "person" within the FCA, the only public

> entities remaining are municipal corporations and other political subdivisions of states which are not arms or agencies of state government.

277 F.3d at 987. In short, by indicating an intent to bring municipal employees under the whistleblower protections, the Senate unmistakably indicated its understanding that municipal employers are already covered by the FCA. Again, that understanding is irreconcilable with an intent to repeal that existing coverage through the 1986 Amendments.

Fourth, the Senate Report explicitly and approvingly described an FCA lawsuit against the manager of a local housing authority in his official capacity. *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961)[7]; *see* S.Rep. 99-345 at 9. Congress' reliance on this case is further evidence that it knew that local governments were capable of violating the FCA.

In short, all the relevant legislative history refutes the notion that Congress intended, *sub silentio*, to cut back the FCA by eliminating municipalities' previous coverage. While petitioner quibbles with some of this legislative history, it has none of its own to offer. For example, petitioner asserts that there were no reported cases as of 1986 under the FCA against municipalities. Pet. Br., 24, n.12. But there were cases. *See, e.g., United States v. Board of Education of City of Union City*, Civil Action No. 83-2651, 1985 U.S. Dist. LEXIS 14917 (D.N.J. 1985); *United States v. Escondido Union School Dist.*, No. 78-0845-S (S.D.Cal.). In any case, before 1986, there were few FCA *qui tam* cases of *any* kind. A major impetus behind the 1986 Amendments was a desire to reinvigorate the FCA.

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[7] At the time *Smith* was decided, the Beaumont Housing Authority was a local unit of government established pursuant to Texas' Housing Co-Operation Law, 45 Leg. chs. 460, 461 (1937); as revised, Tex. Loc. Gov't Code Ann. §393 (1986).

B. The "Express-Language" Common-Law Presumption Cannot Be Used To Infer An Implied Repeal Of The FCA's Preexisting Coverage Of Municipal Corporations.

It would be disturbing if the law compelled this Court, in considering Congress' 1986 intent, to reach a conclusion that is so manifestly untrue – that Congress, in an aggressively expansive amendment to the FCA, intended silently to destroy the statute's existing coverage of municipal corporations. But in truth, nothing in this Court's cases justifies such a result.

Petitioner's principal argument for an implied repeal of FCA coverage runs as follows: (1) in *Newport* and *Stevens*, this Court invoked the principle that a statute employing common-law punitive damages is presumed not to apply to public bodies unless Congress specifically says so; (2) treble damages were held in *Stevens* to be "essentially punitive" in nature and are therefore covered by this principle; (3) the 1986 Amendments made treble damages mandatory as to all defendants found liable under the FCA; (4) Congress did not specify that treble damages apply to municipal corporation defendants; and (5) therefore this Court, regardless of other evidence of Congress' intent, must infer an intent by Congress to remove municipal corporations from the coverage which up until then had applied to them. This argument lacks merit for three separate reasons.

1. *Newport* and *Stevens* do not create an irrebuttable presumption of congressional intent.

Newport asked whether Congress, when it enacted §1983 in 1871, had intended to subject municipalities to punitive damages under the new statute, and concluded that Congress had not. Among other reasons, because municipalities were immune from punitive damages at common law and because Congress provided neither a

damages regime in §1983 nor expressed an intent to abrogate common-law immunity, the Court concluded that Congress had not in fact abrogated it *sub silentio*. *Newport*, 453 U.S. at 258 (Congress did not override existing common law "by implication").

Petitioner reads *Newport* to create a single controlling test of Congressional intent for the applicability of punitive damages. In petitioner's view, if punitive damages are involved, and Congress does not specify that municipalities are subject to them, that creates an irrebuttable presumption of Congressional intent, and nothing else matters. In petitioner's view, because Congress did not jump through this one particular hoop – specifying that treble damages apply to municipalities – all the other indications of Congressional intent on the matter, discussed above, must be ignored, and the implausible conclusion must be accepted that Congress intended *sub silentio* to repeal the FCA's preexisting coverage of municipal corporations.

This view reads *Newport* far too broadly. If *Newport* had intended to create this unique test of Congressional intent, most of the opinion would have been unnecessary. This Court could have simply pointed to the absence of any language in §1983 about punitive damages being imposed on municipalities, and ended its inquiry. Instead, *Newport* first considered the state of the common law when §1983 was enacted and then looked to see if anything in the legislative history could overcome the common-law presumption that punitive damages would not be imposed. *Newport* further examined the relationship between punitive damages and the goals of §1983 to see if immunizing local governments from punitive damages was consistent with those goals. The Court also weighed the broad scope of §1983, the wide discretion that juries have in awarding extremely large punitive damages, the fact that punitive damages are a windfall to an already fully-compensated plaintiff, and the prejudicial effect that a municipality's "unlimited taxing power" might have on a

jury. After considering this complex calculus, the Court concluded that Congress had not intended municipalities to pay punitive damages under §1983. While the common-law presumption against applying punitive damages to municipalities in the absence of a specific statutory provision played a significant part in this calculus, *Newport* did not treat this factor as trumping all other evidence of Congressional intent.

Nor did *Stevens*. There, this Court described the FCA's treble damages regime as "essentially punitive," and used that fact as one factor among many to conclude that the 1986 Amendments had not intended to broaden the original FCA to cover States. 529 U.S. at 784-85.

In short, this Court has used the "express language" presumption as one tool among many for ascertaining Congressional intent. That common-law presumption about punitive damages and municipalities cannot be used blindly to reach a conclusion about Congressional intent that is overwhelmingly contrary to the purpose, text, and legislative history of the 1986 Amendments.

2. Because Congress in 1986 did not believe treble damages to be "essentially punitive in nature," application of the punitive-damages presumption about congressional intent is unjustified.

The presumption discussed by this Court in *Newport* and *Stevens* puts Congress on notice that in enacting provisions that are "essentially punitive in nature" (*Stevens*, 529 U.S. at 784-85), it should specify that municipalities are covered, or this Court may presume that Congress did not intend such coverage. Applying that presumption makes sense, and is a fair measure of congressional intent, where the remedy being enacted has been established as "essentially punitive." In such a situation, when Congress fails to specify that the punitive remedy applies to municipalities, a court usually

(although not invariably) has good reason to infer Congress' intent.

But applying that presumption makes no sense, and is not a fair measure of congressional intent, when Congress has reason to believe that its remedy is *not* "essentially punitive in nature." In such a situation, one would not necessarily expect Congress to specify the applicability of its remedy to municipal corporations, and no conclusion can be drawn one way or another from Congress' failure specifically to address this issue in the statute's text.

Such is the case with the 1986 Amendments. Although *Stevens* declared, for the first time, that treble damages were "essentially punitive in nature," this was not the prevailing understanding of treble damages when Congress imported them into the FCA in 1986. In 1986, Congress believed that treble damages were essentially remedial, not punitive, in nature. In this belief, it was supported by extensive case law.

Congress took up consideration of the 1986 FCA Amendments against settled law that the preexisting *double* damages scheme was compensatory, not punitive. *See United States v. Bornstein*, 423 U.S. 303, 315 (1976) ("double damages are necessary to compensate the government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-53 (1943) (double-damage provision is designed "to provide for restitution to the government of money taken from it by fraud" and "to make sure that the government would be made completely whole").

Nor were *treble* damages established as "essentially punitive in nature" in 1986. As petitioner acknowledges, "[p]rior to *Stevens*, the law was unsettled as to whether the FCA's [new treble] damages under the 1986 Amendments were punitive." Pet. Br., 22. The year before the 1986 Amendments, this Court had held that the Clayton Act's treble damages were essentially remedial:

> Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by §4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury. "Section 4 is in essence a remedial provision. . . . Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy. (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977).

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635-36 (1985). Two years later, in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987), the Court observed that "[b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees." *See also American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 557-76 (1982) (same); *Restatement (2nd) of Agency* §217C, Comment C (distinguishing between punitive damages and statutory treble damages for purposes of imposing vicarious liability). Furthermore, only a few years earlier, the Court had upheld the application of antitrust statutes against municipalities despite the potential for treble damages should liability be found. *See Community Communication Co. v. City of Boulder*, 455 U.S. 40, 50-51 (1982); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 396 (1978).

Given the case law as of 1986, Congress justifiably viewed its increase in FCA damages from double to treble as essentially remedial, not punitive, in nature. The legislative history of the 1986 Amendments makes this view clear. For example, the Senate Report stated: "False Claims Act proceedings are civil and remedial in nature

and are brought to recover compensatory damages." S.Rep. 99-345 at 31. It stated that the FCA is "remedial" even though it permits a treble recovery. *Id.* The House Report agreed. H.R.Rep. No. 99-660 at 25 (1986) ("[t]he False Claims Act is basically a remedial statute"). The Senate Report explained the rejection of any specific intent to submit a false claim and the adoption of "the preponderance of the evidence standard" as the appropriate standards for civil, "remedial statutes" like the FCA. S.Rep. 99-345 at 7, 31.

Equally revealing is the legislative history of how the treble-damage provision came about: it was a simplified version of a measure that was introduced as an expressly *compensatory* provision. The original House version of the 1986 FCA Amendments provided for a separate award of "consequential damages" – *i.e.*, damages beyond those encompassed in the return to the federal government of the money it had given the defendant – in addition to the double damages already available. *See* S.Rep. 99-345 at 39; 132 Cong.Rec. H6479 (1986). The House favored double damages plus consequential damages to "make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." H.R.Rep. 660 at 20. *See also* 132 Cong.Rec. H6480 (1986) (the House bill "would make consequential damages the measurement standard – thus allowing a recovery for indirect losses that are the result of the fraud as well as actual direct losses. This is a realistic, fair change which ensures the recovery will reflect actual replacement cost in every instance"). Rather than employ this two-pronged determination of different kinds of actual damages, Congress ultimately settled on the simpler scheme of treble damages. *See* 132 Cong.Rec. S11238 (Aug. 11, 1986); 132 Cong.Rec. S15036-37 (Oct. 3, 1986); 132 Cong.Rec. H9388 (Oct. 7, 1986). The point is that all advocates of increasing the measure of FCA damages had compensation in mind, not punishment.

Moreover, Congress had a specific reason to believe that increasing the FCA damages from double to treble was necessary to assure full compensation to the federal government. The Amendments increased the percentage paid to relators, thereby increasing the costs to the government of a successful *qui tam* action and correspondingly reducing the government's share of a recovery. The increase from double to treble damages would offset this cost and help assure full compensation to the government at the end of the case.

Petitioner cites a single statement of a single Congressman, Rep. Fish, in support of the assertion that "Congress understood the [treble] damages to be punitive." Pet. Br., 26, citing 132 Cong.Rec. 22,336-37 (1986), where Rep. Fish alluded to the "deterrent effect" of the statute and refers to "punishment." His statement in no way contradicts the congressional consensus that the amended FCA would continue to be essentially remedial in nature. This Court has long established that neither a damage regime's deterrent effect nor the characterization of a damage regime as "the penalty" or "the punishment" automatically converts it to a punitive regime. *See, e.g., Hudson v. United States*, 522 U.S. 102 (1997) ("[a]ll civil penalties have some deterrent effect"); *Newport*, 453 U.S. at 268 (explaining that §1983's purposes are primarily compensation and deterrence as distinguished from punishment); *United States v. Halper*, 490 U.S. 435, 447, n.7 (1989) ("for the defendant even remedial sanctions carry the sting of punishment"). Indeed, Rep. Fish was talking about the *unamended*, double-damages version of the FCA, and as discussed above, it was and is settled that double damages are essentially remedial in nature.

In summary, when Congress increased FCA damages from double to treble in 1986, it believed its action was essentially remedial not punitive, in nature, and the law as it then existed made that assumption highly reasonable. Eventually, of course, this Court concluded that treble damages *were* "essentially punitive in nature." But

until this Court spoke on that issue, Congress was entitled to believe the opposite. Because it did, no inference about Congress' intent can be drawn from its failure to have the amended FCA specify that treble damages applied to municipal corporations.

In contrast, in *Newport*, there was no dispute in 1871 (and there is none today) about whether "punitive damages" under §1983 are punitive. It was therefore reasonable for this Court to conclude that if Congress had intended to subject municipalities to punitive damages under §1983, it would have said so.

3. This Court has never applied the "express-language" presumption to find an implied repeal of a statute's previous coverage.

In urging that the "express-language" presumption about Congress' intent be applied to the present case, petitioner is advocating something quite different than the Court did in *Newport*. In *Newport*, all parties agreed that §1983 itself applied to municipalities. The only issue was whether Congress, when it originally enacted §1983, had intended one form of available damages under the statute to apply to municipalities. In the present case, however, petitioner is arguing that the absence of a specific 1986 reference to municipalities effectuates the implied repeal of the entire FCA with respect to municipalities.

Using the "express-language" presumption for this drastic purpose is unprecedented and unwarranted. It is one thing to use the presumption to draw conclusions about what Congress intended about the remedial scope of an originally enacted statute. It is quite another thing to use the presumption to conclude that a subsequent Congress intended to wipe the entire underlying law off the books with respect to a huge category of defendants in the original Act. Such a use of the presumption is particularly

indefensible when the law in question – the 1986 Amendments – was clearly intended to effectuate an aggressive expansion of the FCA's coverage, and when nothing in the text or legislative history even hints that Congress wanted to repeal any part of the FCA.

C. Petitioner's Remaining Arguments For Its Interpretation Of Congress' 1986 Intent Have No Merit.

1. The arguments based on the FCA's Civil Investigative Demand provision and the Program Fraud Civil Remedies Act.

Petitioner argues that the CID provision of the FCA and the separate Program Fraud Civil Remedies Act, both enacted in 1986, show that Congress intended to immunize municipalities from the FCA. These arguments, derived from *Stevens*, have no merit in the context of municipal corporation defendants.

In *Stevens*, this Court observed that "the presence of . . . a definitional provision [including States] in §3733 [the CID provision] together with the absence of such a provision contained in §3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under §3729." 529 U.S. at 784. Petitioner attempts to extend this reasoning to municipal corporations. Pet. Br., 28-30.

The argument is invalid, as is clear from the *Stevens* majority's response to a point made by the *Stevens* dissent. The dissent pointed out that §3733's definition of "person" covers "any natural person, partnership, corporation, association, or other legal entity." Hence, said the dissent, if the inclusion of certain items in §3733 implied their exclusion as a "person" under §3729, there would be absolutely no one left to be a "person" under §3729. 529 U.S. at 799 (Stevens, J., dissenting). The majority replied

that "[u]nlike States, all of those entities are presumptively *covered* by the term 'person.'" *Id.* at 784, n.14 (emphasis in the original). Similarly, as explained above, municipalities *were* presumptively included in the term "person" in 1863. In short, nothing about the CID provision supports the notion that Congress suddenly – and silently – decided to eliminate municipal corporations from the FCA's preexisting coverage.

Similarly, petitioner's argument about the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. §3801 *et seq.*, is meritless. *Stevens* noted that the PFCRA does not cover States and that it would have been "most peculiar" for Congress to subject states to FCA liability while "exempt[ing] them from the relatively smaller damages provided under the PFCRA." 529 U.S. at 786. Petitioner argues that "[t]he same is true for local governments." Pet. Br., 33.

The argument has no merit. As respondent has already noted, *supra* at 31 n.6, the relevance of the 1986 Amendments to the FCA, or of the contemporaneously-passed PFCRA, is different than it was in *Stevens*. In *Stevens*, the Court concluded that the 1863 FCA had not included States in the term "person," and then considered whether Congress had intended in 1986 to *broaden* the FCA's coverage by adding the States to the meaning of the word "person." 529 U.S. at 782-87. Here, Congress in 1863 *did* intend to include municipal corporations in the term "person," and the issue is whether Congress in 1986 intended to *narrow* the FCA's coverage by *removing* municipal corporations from the meaning of the word "person." The absence of States in the 1986 PFCRA's coverage suggests that Congress did not mean, *sub silentio*, to expand the FCA's coverage that same year to States. But even if the PFCRA excludes municipal corporations –

a proposition for which petitioner provides no authority[8] – the absence of municipalities in the PFCRA's coverage does not suggest Congressional intent in 1986 to *abolish* a different statute's coverage of them, particularly given the legislative history of the 1986 Amendments showing the opposite intent.

Petitioner also argues that another subsection of the PFCRA, §3801(a)(9), employs the phrase "political subdivision of a State" in defining the term "statement." Petitioner says that this "signif[ies] that the 99th Congress was well aware of the language it needed to employ in order to bring local governments within the purview of a statute." Pet. Br., 32. But as discussed above, the issue is not what Congress had to do in 1986 to bring municipal governments within the FCA's coverage. They already were covered. Congress left them covered in 1986 simply by not changing the century-old use of the word "person" and by not adding a definition of "person" to the FCA.[9]

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[8] The PFCRA defines "person" as including corporations, §3801(a)(6), and as discussed in detail above, the term "corporation" has long covered both public and private corporations.

[9] Moreover, §3801(a)(9) is irrelevant to any issue of *who is covered*, either under the PFCRA or the FCA. Section 3801(a)(9) serves the different purpose of assuring that a person otherwise covered by the PFCRA can be held liable not only for lying directly to the federal government, but for lying to some other entity, such as a municipality, in connection with applying for money that will ultimately be paid by the federal government. Section 3801(a)(9) reads, in relevant part:

> "[S]tatement" means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made –
>
> * * *
>
> (B) with respect to (including relating to eligibility for) –
>
> (i) a contract with, or a bid or proposal for a contract with; or
>
> (ii) a grant, loan, or benefit from,

(Continued on following page)

For that reason, the PFCRA shows the opposite of what petitioner contends. The PFCRA shows that Congress knows how to define "person," and had Congress intended to narrow the previous meaning of "person" in the FCA, Congress could have added a restrictive definition of "person" in §3329. The fact that Congress did not do so supplies further evidence, if any were needed, that Congress had no intent to narrow the previous coverage of the FCA in any way, much less to abolish the FCA *sub silentio* as to municipal corporations.

2. The "policy" arguments.

Petitioner and its *amici* argue at length that it is undesirable for them to be subject to the FCA. Such arguments are to be expected. No one, municipal corporations included, likes to repay money that has been procured from the federal government by false statements. Abusers of federal funding particularly dislike the fact that the expanded whistleblower provisions of the amended FCA make it much more likely that they will be caught. But such attitudes are no reason to overrule Congress' choices in 1863 and 1986. Petitioner's "policy" arguments are appropriately addressed to Congress, not to this Court.

All of petitioner's policy arguments share a common characteristic: an *in terrorem* equation of treble damages with common-law punitive damages. This equation is

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an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1954.

unjustified. Notwithstanding *Stevens*' observation that treble damages are "essentially punitive in nature," there remain significant differences between treble damages and common-law punitive damages. As the court of appeals rightly held, these differences mitigate the concerns about common-law punitive damages that this Court addressed when it decided *Newport*.

Unlike common-law punitive damages, in which a jury's largely-unbounded discretion generally serves as the only upper limit on what can be "both unpredictable and, at times, substantial," 453 U.S. at 270-71, FCA treble damages follow automatically from proof of the amount of the false claim. They therefore have a specific upper limit that is rationally related to the federal government's loss. *Chandler*, 277 F.3d at 978; *see United States v. Barnett*, 10 F.3d 1553, 1560 (11th Cir.), *cert. denied*, 513 U.S. 816 (1994) (civil penalty plus treble damages under the FCA has a rational relation to the government's loss).

Treble damages are not only rationally related to the government's loss, but may in fact undercompensate the government. For example, in the present case, the federal government paid petitioner more than $5,000,000.00 over a six-year period beginning in 1989. By the end of 2002, prejudgment interest on that amount – which under the FCA is recoverable only indirectly, as part of treble damages – will exceed $6,000,000.00, and it will continue to grow. Moreover, the relator will be entitled to a substantial percentage of any recovery under the expanded-percentage provision of the 1986 Amendments. §3729(a). Thus, without the treble-damage provision, there would be little prospect of the federal government fully recovering its losses from petitioner's conduct.

As this analysis shows, in contrast to the windfall recovery that common-law punitive damages provide to otherwise fully-compensated individual plaintiffs, the bulk of any recovery under the FCA goes to the federal government to indemnify it for the losses associated with the fraud and compensate for the costs of recovery. And unlike

§1983 punitive damages where both the compensatory and punitive damages come from the tax base, "[u]nder the FCA, at least a portion of the recovery will come from the monies taken by the municipality through its false claims." *Chandler*, 277 F.2d at 978.

In light of these considerations, the specific "policy" arguments advanced by petitioner are merely an unjustifiable disagreement with Congress' legitimate choice of means to enforce honesty among its municipal grantees.

The "special relationship" argument. Petitioner argues that because the relationship between the United States and local governments "is necessarily one of co-dependence and cooperation," local governments that make false claims should not be held liable for treble damages under the FCA. According to petitioner, this immunity is essential because relators may aggressively bring *qui tam* actions against local governments that the federal government might choose not to bring. Such actions, says petitioner, may have the effect of disrupting local services or, even worse, "leave local governments with the equally unpalatable choices of rejecting federal funds or, if sued, either being coerced into settlement . . . or incurring the cost of litigation and risking a substantial adverse judgment, which, of course, would be shouldered by the local taxpayers." Pet. Br., 34.

These hyperbolic arguments are unconvincing. First, municipal corporations, like private corporations, can avoid such dilemmas by not making false claims against the federal government. To deter such false claims, Congress deliberately made their consequences expensive. To put it bluntly, treble damages give a municipality a strong incentive to prevent and root out fraud.

Second, petitioner's concern about renegade relators, "motivated primarily by prospects of monetary reward rather than the public good," with interests that are "incompatible with the interests of the United States," Pet. Br., 33-34, is nothing but a quarrel with Congress' choice of means in the FCA. Congress *wants* aggressive relators.

Congress recognized that the federal government's resources to detect and prosecute fraud have been overwhelmed by the vast scale of federal assistance and the startling prevalence of fraud. Thus, when Congress expanded the rewards for successful relators in 1986, it aimed to create a broad pool of "private inspectors general" who would do what the federal government could not do by itself.

Nonetheless, the FCA places checks on overzealous relators. The federal government remains integral to the *qui tam* lawsuit even when it refrains from intervening. At the end of its investigation, the federal government may move to dismiss the lawsuit, with or without the relator's approval, S.Rep. 99-345 at 26; §3730(c)(1). The government can stay discovery in the relator's suit if it interferes with a government investigation, §3730(c)(4). It can insist that the relator serve it with copies of all pleadings and obtain its approval for any settlement; and it routinely files *amicus* briefs on issues it believes important. And as the court of appeals pointed out, the 1986 Amendments provide ample ammunition to deter frivolous suits:

> If the basis for the suit was information that was already available, a district court may limit a relator's recovery to 10 percent of the award, *id.* §3730(d)(1), or bar the suit entirely unless the Attorney General prosecutes the case, *id.* §3730(d)(4)(A). If the relator himself planned or was guilty of violations of the FCA, the court may dismiss his suit. *Id.* §3730(d)(3). If the relator proceeds with the suit himself and the court finds that the suit was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment," the court may award the defendant attorneys' fees and expenses. *Id.* §3730(d)(4). . . . These changes gave courts more discretion to regulate *qui tam* suits and to weed out illegitimate actions.

Chandler, 277 F.3d at 976.

Third, the so-called special relationship between "the United States and units of local government" based upon "co-dependence and cooperation," proves too much. The federal government relies heavily on a "cooperative relationship" with thousands of *private* corporations with whom it contracts directly to deliver services to residents of local governments. As a practical matter, the relationship between the federal government and municipal corporations differs little from the relationship between the federal government and the myriad of private corporations – corporations with whom municipalities directly compete for federal funds. For example, private hospitals and schools routinely compete with public hospitals and schools for research grants or Medicare and Medicaid dollars. Under petitioner's theory, if a private hospital falsifies its results or misdirects funds, it is liable for treble damages and penalties, above and beyond whatever "other remedies" the United States has at its disposal. But if Cook County Hospital engages in such misbehavior, it is subject (in petitioner's view) to no FCA liability whatsoever, and may be required to disgorge only in the unlikely event that it is specifically targeted by a federal investigation.

Fourth, the "innocent taxpayers" argument carries little force, and is counterbalanced by the great benefit to taxpayers that results from the healthy fear of FCA suits that the current regime imposes on municipal corporations. In any FCA case, the ultimate financial burden of a judgment or settlement will normally be borne by innocent bystanders. When a for-profit corporation is found liable, the burden is ultimately borne by shareholders who doubtless had no intent whatsoever to defraud the government. When a private not-for-profit corporation like the University of Chicago Hospitals is found liable under the FCA, the burden is borne by its consumers and monitors of medical services. Frequently, if not usually, the financial burden on such innocent private parties will be harder for

them to bear than it will be for taxpayers in the case of municipal defendants.

In any case, Congress has determined any costs of a treble-damages scheme to be offset by the benefit to the public from making sure that federal funds actually yield the expected results. It is hard to see how Cook County taxpayers – who also pay federal taxes, as well as the costs associated with providing services to children born to drug-addicted mothers – benefit from Cook County's proposed immunity, or why the federal courts should adopt such a position in the face of clear congressional intent to the contrary.

The "other remedies" argument. To support its plea for implied repeal of the FCA as to municipal corporations, petitioner cites the fact that the United States has other remedies to combat fraud by local governments, "such as administrative proceedings, proceedings to suspend or debar a local government that is eligible to enter into contracts with the federal government, or actions in fraud, unjust enrichment and breach of contract." Pet. Br., 37. This fact is no basis for overriding the decision of Congress to include local governments within the reach of the FCA. Those other remedies are available against all potential FCA defendants – a fact that does not restrict the reach of the FCA in any way.

Moreover, as the presence of the United States *amicus curiae* in support of respondent attests, the Justice Department and the various federal agencies lack the resources to monitor the billions of federal dollars flowing to local governments in the form of grants, programs, and contracts.

The FCA, with its *qui tam* provision, is the "Government's primary litigative tool for combating fraud." S.Rep. 99-345, at 2. Any remedial scheme has costs, and no scheme will please everyone. But the treble-damages scheme of the amended FCA produces obvious and substantial benefits in addressing a major problem which – as the present case shows – municipal corporations are very

much a part of. The decision to impose a treble-damages scheme of compensation on all defendants – whether individuals, private corporations, or municipal corporations – was Congress' to make.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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